Supreme Court, U.S.
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No. 10-10-943

In The

Supreme Court of the United States

ROBERT FOREST,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where, after a criminal case is dismissed, uncontroverted evidence comes to light establishing that the arrestee was acting in self-defense, may a State nonetheless leave the arrest record on the books, thereby allowing it to provide justification for future actions adverse to the arrestee--including the refusal to renew his concealed weapons permit?

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The unpublished order of the Mendocino County Superior Court appears in the appendix at pages 11 through 15.

The unpublished opinion of the California Court of Appeal affirming the Superior Court's order appears in the appendix at pages 1 through 10.

The unpublished order of the California Supreme Court denying review appears in the appendix at page 16.

STATEMENT OF JURISDICTION

Petitioner Robert Forest claims that his rights under the Fourteenth Amendment of the U.S. Constitution to due process of law were violated by the Mendocino County superior court's order, affirmed by the California Court of Appeal, refusing to expunge his arrest record. In addition, Forest claims that the superior court's order effectively imposes penalties on him on account of his use of a handgun in self-defense, thus violating the Second Amendment. This Court therefore has jurisdiction under 28 U.S.C. § 1257(a).

The California Supreme Court denied Forest's petition for review on October 20, 2010. This petition is timely under Supreme Court Rule 13.1 and 28 U.S.C. § 2101(d).

RELEVANT CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment II:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

United States Constitution, Amendment XIV, section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

The undisputed evidence in this case showed that petitioner Robert Forest drew his fully permitted handgun only after a mentally ill panhandler with a history of misplaced aggression had followed him down the street for three minutes, threatening him the whole way. Nonetheless, he was arrested and charged with assault. When the district attorney learned the facts surrounding the arrest, she moved

to dismiss the case for want of sufficient evidence, and the police department opened an investigation into the conduct of the arresting officer. The court dismissed the case and the police officer left the force, but Mr. Forest was left with an arrest record, with all of its attendant collateral consequences.

Forest sought to have that record expunged under a California statute that authorizes such a procedure, but the trial court denied the request, and the California Court of Appeal affirmed on the ground that the trial court was permitted to disregard Forest's claim of self-defense—even though the prosecution had introduced no evidence to contradict it.

In its simplest terms, this case arises because local officials, sworn to uphold the law and protect the citizenry, chose instead to arrest and prosecute the victim of a crime rather than its perpetrator. As a result, an innocent man has been left with an undeserved black mark on his record and reputation—one that will prevent him from enjoying the rights and privileges accorded citizens with unblemished records —including, quite possibly, the right to ever again carry a handgun for self-defense.

By leaving Forest's arrest record on the books, the California courts have violated both the Second and Fourteenth Amendments. This Court should grant *certiorari* to ensure that the States provide to citizens like Mr. Forest an effective mechanism for expunging the records of similarly unjustified arrests.

STATEMENT OF THE CASE

Petitioner Robert Forest was emerging from a coffee shop when Stanley Douglass asked him for a cigarette. (CT 63, 77, 153-55, 221, 224, 247, 249, 253.)[1] Douglass was a mentally ill homeless man with a history of misplaced aggression, who was known to the local police force as someone who tried to start fights in public. (CT 62, 68, 125, 272, 274, 275, 276, 315, 323, 338, 339, 374, 375, 376.) Forest, who does not smoke, rebuffed the demand with a brief comment and kept walking. (CT 63-64, 221, 247-49, 253.) Although Douglass was not sure what Forest had said, he believed that it was something "aggressive" or "confrontational." (CT 63-64, 78-79, 91-92, 94, 253.) So he began following Forest demanding to know what he had said. (CT 64, 79, 92.) For the next three minutes, he walked behind Forest close enough to touch him, all the while speaking menacingly and vowing to "f**k [him] up." (CT 64, 79, 92, 221, 248, 249, 250, 253, 255.)

Eventually, Forest—who had been issued a permit to carry a concealed weapon—turned on his assailant, drew a handgun, and told him to back off. (CT 66, 107, 221, 247, 248, 251, 254, 267.) When Douglass kept coming, Forest pushed him back with one hand, still aiming the pistol at him with the

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[1] Factual statements are supported by citations to the clerk's transcript ("CT") and reporter's transcript ("RT") on file with the California Court of Appeal.

other. (CT 24-27, 44-45, 49, 52, 64, 221, 251.) With the tables thus turned, Forest was able to get on his motorcycle and ride away, intending to file a complaint with the police department after picking up his daughter. (CT 28, 221, 254, 257, 259, 262-63, 264-65.)

The police received a call about the incident from a witness who had seen only the tail end of the incident as he was driving past. (CT 33.) The next day, when Forest went to the police station to file a complaint, he was arrested and charged with assault with a deadly weapon. (CT 1-2, 16-18, 209, 213, 264.) At the preliminary hearing, the prosecution introduced the testimony of the passer-by—who admitted that he had not seen the beginning of the incident and that Forest could have been acting in self-defense—and that of Douglass—who admitted that he had been "aggressive" and "combative," and who acknowledged that he knew that Forest "thought I was coming at him aggressively." (CT 41-42, 64, 66-67, 79, 99.)

Despite this evidence, the court ordered that Forest be held over for trial. (CT 160-61.) But before a trial could be held, the prosecution moved to dismiss the case for want of evidence, and the court granted the motion. (RT 3; CT 232.)

Forest then filed a petition seeking a declaration of factual innocence under California Penal Code section 851.8(c). (CT 233-35.) In support of the motion, he submitted several declarations and other evidence that established the facts as set forth above, and that supported his claim that he drew his weapon

out of an honest and reasonable belief that doing so was necessary to prevent death or injury. (CT 238-78.)

The court denied the petition. (CT 385-87.) The court acknowledged that Forest had squarely framed and substantiated a *prima facie* case of self-defense, thus shifting the burden to the prosecution to disprove the defense. (CT 386.) But the court found that the prosecution had disproved the defense with the testimony of Douglass—who had admitted making Forest feel threatened—and the passer-by—who had admitted that he had not seen how the incident began. (CT 386-87.)

Forest appealed, and the California Court of Appeal affirmed, but not for the reasons articulated by the trial court. Instead of adopting the trial court's finding that the prosecution had rebutted Forest's *prima facie* showing of self-defense, the Court of Appeal affirmed on the ground that the trial court would have been entitled to disregard that showing in the first instance—in other words, that the court was "not required to accept as true defendant's declaration that he acted in self-defense"—even though the prosecution had no evidence to the contrary. (App. 1-10.)

Forest then petitioned the California Supreme Court for review, but the Court denied the petition. (App. 16.)

REASONS FOR GRANTING THE PETITION

In *Paul v. Davis*, 424 U.S. 693 (1976), this Court held that two police chiefs did not deprive an individual of any "liberty" or "property" interest protected by the Fourteenth Amendment when they included his name and photograph on a list of shoplifters circulated to local merchants, even though the charge of shoplifting against him had never been resolved and was later dismissed. The Court, speaking through then-Justice Rehnquist, explained in essence that a state official who unfairly stigmatizes a private citizen, though he might be liable for defamation, has not thereby violated the Constitution. (*Id.* at 701, 711-12.)

Much has changed in the 35 years that have passed since the Court decided *Paul*. For one thing, the amount of potentially damaging information that the state and federal governments collect about their citizens has vastly increased. By 1989, the Federal Bureau of Investigation had accumulated criminal records on over 24 million persons. *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 751 (1989). And between 1984 and 1999, the number of individuals with state criminal histories almost doubled from 30.3 million to more than 59 million. Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1198 (2006).

These "rap" sheets—an acronym for "Record of Arrest and Prosecution" (James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States,*

the European Union and Interpol Compared, 30 LOY. L.A. INT'L & COMP. L. REV. 125, 128 (2008))—are notoriously erroneous and incomplete. *Reporters Committee*, *supra*, 489 U.S. at 752. In particular, they often set forth arrests with no indication of how the case was resolved. Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 895 n. 265 (1996).

The uses to which this raw arrest data is put have expanded dramatically through the years. In conjunction with other information, the mere record of an arrest may be used:

- to provide a law enforcement officer with reasonable cause to conduct a search [*People v. Hollins*, 173 Cal.App.2d 88, 92 (1959)];
- to justify a "no knock" entry [*People v. Henderson*, 58 Cal.App.3d 349, 355-56 (1976)];
- to lead a law enforcement officer to arrest a juvenile suspected of a crime rather than taking some other action short of arrest [Robert M. Regoli, John D. Hewitt & Matt DeLisi, DELINQUENCY IN SOCIETY 547 (2009)];
- to justify a strip search of an arrestee brought to a jail facility on charges of committing a minor offense [*Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir. 1993)];
- to justify a probation officer's recommendation regarding an appropriate punishment

[*People v. Ratcliffe*, 124 Cal.App.3d 808, 823 (1981)].

The repercussions of an arrest record are not limited to the criminal justice system. In fact, in many contexts, the mere fact of a previous arrest can operate as a disentitlement. In some states, for example, an arrest record is grounds for refusing to issue a permit to carry a concealed weapon (or for revoking one that has already been issued). *See*, *e.g.*, Va. Code § 18.2-308(J). It can also be grounds for denying a license or special permit to operate or manage a community care facility, hospice, or day care. *See*, *e.g.*, Cal. Health & Saf. Code, §§ 1522(e), 1568.09(e), 1569.17(e), 1596.871(e).

But it is not just the government that makes decisions based on arrest records. Many state and federal agencies routinely release arrest records not only to private individuals but also to companies in the business of assembling and packaging the information for sale to the public. Geiger, *supra*, 94 CAL. L. REV. at 1198. The databases maintained by these companies are accessible to anyone willing to pay the fee, and many employers routinely check them as part of the hiring process. Perhaps most distressing of all, 41 states impose no limitations on private employers' freedom to base hiring decisions on the mere fact that the applicant was once arrested. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1503-1505 (2003).

In the face of this trend, some states have enacted mechanisms to enable persons who were arrested but never convicted to expunge their records, but many states have no such procedure, and such remedies as are provided are often ineffectual. Geiger, *supra*, 94 CAL. L. REV. at 1200. This case is a perfect illustration: Although the uncontradicted evidence established that Forest displayed his weapon out of a reasonable fear of imminent bodily harm, the California Court of Appeal held that the trial court was free to disregard that evidence, thus leaving Forest without a remedy.

The result in this case is especially troubling in light of this Court's recent pronouncements about the right to wield a handgun in self-defense. After all, the Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an individual right to keep and bear arms. And last term, in *McDonald v. City of Chicago*, ___ U.S. ___, 130 S.Ct. 3020 (2010), the Court went further, stating squarely that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." *Id.* at 3036 (internal quotation marks and alteration indications omitted).

The result in this case, if allowed to stand, thus impinges on two important constitutional safeguards. Not only has California violated the Fourteenth Amendment by unfairly tarnishing Forest's record, thereby depriving him of numerous rights and privileges available to other citizens, but it has done so as

a direct result of Forest's exercise of rights protected under the Second Amendment.

It is true, of course, that the precise facts of this case may never be repeated. But the specter of similar scenarios unfolding in the future is palpable. The Court is no doubt well aware that many states and municipalities have bristled against the Court's recent Second Amendment jurisprudence. What better way for them to resist the import of this Court's pronouncements than to subject other individuals to the same treatment that Forest received? Rather than seeking to convict those who exercise their Second Amendment rights, prosecutors may instead choose to saddle their targets with arrest records, with all of the attendant hardships.

Once again, the facts of this case provide a disturbing illustration of this principle in action. The police officer who decided to arrest Forest included in his report of the incident several incriminating details (such as that Forest had chased Douglass down the street) that the officer claimed to have heard from the passer-by who called the police but which the passer-by denied ever having recounted (or seen). (CT 39, 40, 42, 53-54, 60, 227.) In addition, someone within the police department—possibly the same officer, whose supervisory responsibilities gave him special access to reports—altered another officer's report about the incident, once again adding details tending to incriminate Forest. (CT 220-26.) (The officer who authored that report characterized the altered version as "garbage" and told the police chief that this

sort of thing was "pretty typical" within the department. (CT 360, 367.))

Eventually, the police department commenced an internal affairs investigation, and by the time of the preliminary hearing in this matter the officer responsible for these falsifications was no longer on the force. (CT 126-27, 132.) But the damage had been done. After all, it is unlikely that the officer thought that the truth would remain hidden long enough to lead to a conviction. In all likelihood, his goal was simply to harass Forest and leave him saddled with an arrest record, which is precisely what happened.

CONCLUSION

Several years ago, Congressman Jerrold Nadler introduced the "Clear Your Good Name" Act, designed to ensure that all states provided an effective mechanism for expunging records of arrests that did not result in convictions. H.R. 1154, 107th Cong. (2001); H.R. 1009, 108th Cong. (2003). In support of the bill, Congressman Nadler observed that "arrest records can prejudice opportunities for schooling, employment, professional licenses, and housing," and that "innocent individuals who have done nothing wrong should not be marked for life." 147 CONG. REC. E412-413 (Mar. 21, 2001) (statement of Rep. Nadler). Both times, the bill died in committee.

This Court can and should pick up where Congressman Nadler left off. Given the alarming range of

disentitlements that can flow from an arrest record, the Court should hold that the states must provide an effective mechanism for removing these needlessly damaging records from the books.

Respectfully submitted,

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JOSEPH FOREST, Defendant and Appellant.	A124144 (Mendocino County Super. Ct. No. 06-74772)

Defendant Robert Joseph Forest appeals from the court's order denying his petition for a finding of factual innocence (Pen. Code,[1] § 851.8) following the dismissal of the charge of assault with a firearm (§ 245, subd. (a)(2)). He contends that the trial court

[1] All further statutory references are to the Penal Code.

erred in denying the petition because the evidence established that he acted in self-defense. We affirm.

I. FACTUAL BACKGROUND

The testimony at the preliminary hearing revealed the following facts:

At approximately 5:20 p.m. on November 8, 2006, Jacob Long was driving by the Tip Top Lounge on North Franklin Street in Fort Bragg when he heard some yelling and loud obscenities. Long's car window was open and he looked over and saw two men in an altercation. He saw defendant holding a gun to the head of an African-American man (subsequently identified as Stanley Douglass). Defendant was yelling obscenities at Douglass, and was holding him by the back of his shirt with one hand and had the gun to his head with the other. Douglass looked scared. Long recalled defendant telling Douglass, "don't mess with me" or "don't fuck with me." Long thought that defendant was going to kill Douglass. Douglass did not make any threatening gestures and "stood there in shock." Douglass walked away quickly; defendant got on his motorcycle and left. Long called 911.

Douglass testified that on the day of the incident, he was standing with his friend on the street when defendant walked by. Douglass asked defendant for a cigarette. Defendant responded something other than "no" so Douglass followed him and asked him, "what did you say?" Defendant responded aggressively and

said "some profanity." Defendant then pulled a gun out, and grabbed him. Defendant said something about shooting it. Douglass did not physically threaten defendant in any way and tried to walk away. Defendant pointed the gun at Douglass's face and then toward his back. Douglass thought that he could have died that day.

Sergeant Mary Ann Miller testified that defendant came to the police station on the morning of November 9, 2006, and gave her his .32 caliber handgun. He told her that he had used the gun the previous evening for self-defense purposes.

The trial court held defendant to answer, finding that the evidence was sufficient to show that defendant committed an assault with a firearm.

Defendant moved to dismiss the information pursuant to section 995, contending that the magistrate erred in excluding the testimony of Sergeant Brandon Lee regarding statements defendant made to Lee, and that the prosecution failed to adduce sufficient evidence at the preliminary hearing because Douglass's testimony lacked credibility and was contradictory. The court denied the motion, concluding the magistrate's ruling that Lee's testimony was not reasonably likely to establish an affirmative defense was proper. The court noted that: (1) there was eyewitness testimony defendant was holding a gun to the victim's head; (2) substantial evidence supported the magistrate's determination of credibility, and (3) in any event, it would not substitute its

judgment as to the weight of the evidence for that of the magistrate.

On January 18, 2008, the People moved to dismiss the complaint on the ground of insufficient evidence. The court granted the motion.

On October 7, 2008, defendant petitioned for a finding of factual innocence pursuant to section 851.8. In support of the petition, he submitted his declaration setting forth his version of the incident in which he averred that Douglass grabbed his jacket and demanded a cigarette. Defendant responded by telling him that his conduct was a crime and could get him hurt. Defendant said that Douglass followed him and yelled that he was going to "f – – – [defendant] up" and said he was a gang-banger from San Francisco. Defendant became apprehensive and when Douglass placed his hand behind his back, defendant, in fear for his life, drew his pistol to make Douglass back off. Defendant also submitted the declaration of Stephen Soria who stated that he witnessed the incident. He averred that he saw an African American man approach defendant, tug on his jacket, and ask him for a cigarette. Defendant said "no" and pushed the African-American man away. The African-American man followed defendant and they exchanged words. Defendant told the African-American man to get away from him. Defendant reached into his jacket pocket, pulled out a small pistol, and pointed it at the African-American man. They struggled for a few seconds before defendant backed away, put the gun back in his pocket, and walked back to his motorcycle.

The court denied the petition, finding that the People presented substantial evidence that reasonable cause existed to believe that defendant assaulted Douglass with a firearm, and that defendant did not act in self-defense.

II. DISCUSSION

Section 851.8, subdivision (c), provides in pertinent part that "[i]n any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made." In considering the petition, the court applies an objective standard and may consider any evidence relied upon to arrest and charge. (*People v. Medlin* (2009) 178 Cal.App.4th 1092, 1101-1102 (*Medlin*).)

"'[Section 851.8] permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action.'" (*People v. Adair* (2003) 29 Cal.4th 895, 905 (*Adair*).) "A finding of factual innocence 'shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.' (§ 851.8, subd. (b))." (*Medlin, supra,* 178 Cal.App.4th at p. 1101.) "[T]he

record must exonerate, not merely raise a substantial question as to guilt." (*Adair, supra,* 29 Cal.4th at p. 909.)

"A person petitioning for a finding of factual innocence has the initial burden to demonstrate the absence of reasonable cause. To meet this burden, the petitioner must show more than a viable defense to the crime. He or she must establish, '"that there was no reasonable cause to arrest him in the first place."' [Citation.] If this burden is met, the burden shifts to the prosecution to demonstrate the existence of reasonable cause. [Citation.]" (*Medlin, supra,* 178 Cal.App.4th at p. 1102.) Reasonable cause is a well-established legal standard, "'"defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime."' [Citations.]" (*Adair, supra,* 29 Cal.4th at p. 904.)

"We apply an independent standard of review and consider the record de novo to decide whether reasonable cause exists to believe that the person arrested committed the crime charged. '[A]lthough the appellate court should defer to the trial court's factual findings to the extent they are supported by substantial evidence, it must independently examine the record to determine whether the defendant has established "that no reasonable cause exists to believe" he or she committed the offense charged. (§ 851.8, subd. (b).)' [Citation.]" (*Medlin, supra,* 178 Cal.App.4th at p. 1101.)

Defendant contends that the trial court erred in denying his petition for a finding of substantial evidence because the evidence does not support the trial court's finding that he did not act in self-defense. He argues the People failed to disprove his claim of self-defense.

Defendant misunderstands the legal standard for determining factual innocence. On a petition for a finding of factual innocence, defendant bears "the initial burden of proof . . . to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).) Therefore, defendant had the initial burden of proving that there was no reasonable cause to arrest him in the first place. (See *Medlin, supra,* 178 Cal.App.4th at p. 1102; *People v. Bleich* (2009) 178 Cal.App.4th 292, 300.)

Based on the record, there are several objective factors which justified defendant's arrest. (See *Adair, supra,* 29 Cal.4th at p. 905.) First, the evidence at the preliminary hearing established that defendant pulled a gun out and pointed it at Douglass's head. Second, Douglass did not have a gun or any kind of weapon. Third, Long, who observed part of the incident, testified that defendant yelled obscenities at Douglass, and held on to his shirt while he pointed the gun to Douglass's head. Fourth, Long observed that Douglass was frightened and that he at no time made threatening gestures toward defendant. Finally, defendant left the scene of the incident and did not

wait for the police to arrive.[2] Given this evidence, there was reasonable cause to arrest defendant.[3]

While defendant argues that he used the gun in self-defense because he was being pursued by Douglass and saw him reach behind his back, thus causing him to be apprehensive, defendant's self-serving declaration does not establish that he was factually innocent of the charge. Moreover, in view of the testimony of both Long and Douglass at the preliminary hearing, the evidence demonstrated that defendant did not act in self-defense but rather that defendant was the aggressor and confronted Douglass with the gun simply because Douglass argued with defendant. Accordingly, the record provides strong evidence from which a reasonable person of ordinary care and prudence would believe defendant committed the offense – assault with a firearm – for which he was arrested and charged. (See *Adair, supra,* 29 Cal.4th at p. 904.)

Defendant argues that evidence disclosed subsequent to the preliminary hearing concerning

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[2] The district attorney learned after the incident that defendant had prior convictions for violating section 12025, subdivision (b) (carrying a concealed firearm) and section 12031 (carrying a loaded firearm in a public place) while Douglass had no reported record of violence.

[3] We note that Soria's declaration, submitted by defendant in support of the petition, also supports the People's action in filing the complaint against defendant. Soria averred that he witnessed part of the incident and acknowledged that defendant pulled out a small pistol and pointed it at Douglass.

Douglass's "history of violence," shows Douglass precipitated the confrontation resulting in defendant's need for self-defense, and that the evidence conclusively established defendant's factual innocence. It is true that, "notwithstanding probable cause to arrest, facts subsequently disclosed may establish the defendant's innocence." (*Adair, supra,* 29 Cal.4th at p. 905, fn. 4.) Here, however, the new facts alleged fail to establish that defendant was factually innocent of the charge against him. To the contrary, the court properly sustained the People's objections to the evidence proffered by defendant that Douglass had a history of violence.[4] And, the trial court is not required to accept as true defendant's declaration that he acted in self-defense when he saw Douglass reach behind his back. (See *People v. Perry* (1963) 220 Cal.App.2d 841, 845.) In any event, defendant's declaration is at odds with eyewitness testimony by both Long and Soria who stated they saw defendant point the gun at Douglass but said nothing about Douglass's reaching behind his back. Moreover, Long's testimony at the preliminary hearing that defendant was holding onto Douglass while

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[4] The court sustained the People's hearsay, lack of personal knowledge, and bias objections to the declarations of David E. Paoli and the interview report of Joseph Sheehan which defendant submitted in support of his petition. Paoli alleged that Douglass had threatened his son with a maul and "some gang members." Sheehan stated that Douglass had a "'rage issue'" and "'picks fights'" when he is "'off his meds.'"

pointing the gun at his head undermines defendant's claim that his actions were justified in self-defense.

In sum, defendant failed to establish that there was no reasonable cause to arrest him for assault with a deadly weapon in the first instance. The court properly denied his petition for a finding of factual innocence.

III. DISPOSITION

The order is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.

Superior Court of California
Mendocino County

PEOPLE OF THE STATE OF CALIFORNIA, **Case MCTM CRCR 06-74772**

Plaintiff,

vs

ROBERT FOREST,

Defendant. /

Order Denying Defendant's Petition for a Finding of Factual Innocence (PC § 851.8)

(Filed Dec. 22, 2008)

By information filed April 3, 2007, defendant Forest was charged with a felony violation of PC 245(a)(2), assault with a firearm. On December 6, 2007, three days prior to the scheduled December 10 jury trial, the court granted the People's motion to dismiss the charge for insufficient evidence. Defendant Forest now petitions the court for a PC § 851.8(c) finding of factual innocence.

Discussion

Defendant Forest has the initial burden of proving that "no reasonable cause exists" to believe that he committed assault with a firearm. (PC 851.8(b)) He must prove by a preponderance of the evidence "that there was no reasonable cause to arrest him" or, in other words, "that no person of ordinary care and

prudence . . . " with knowledge of the facts "would believe or consciously entertain any honest and strong suspicion" of his guilt." (*People v Adair (2003) 29 C4th 895906-907* citing *Matthews (1992) 7 CA4th 1052, 1056*) If the defense meets this burden the burden then shifts to the People to show "that reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made." (PC 851.8)

Preliminary Rulings

At the request of the People, the court will take judicial notice of the transcript of the March 19, 2007 preliminary hearing. The court will also sustain the objections of the People to (a) the declaration of David E. Paoli and (2) to the interview report of Joseph Sheehan.

Petitioner's burden/showing: The following facts are established from Frost's supporting declaration: While he was walking in the business area of Ft. Bragg at about 5:00 PM, he was accosted by a stranger, later identified as Stanley Brian Douglass, who grabbed his jacket and demanded a cigarette. He told Douglass his conduct was both dangerous and unlawful and did not give him a cigarette. Frost then walked approximately 450' to his parked motorcycle. Douglass continued to follow Frost, claimed to be a "gang-banger" from San Francisco and threatened to "fuck up" Frost. As Frost approached his motorcycle, Douglass repeated his threats and, while within

"striking distance", reached behind his back. Frost then feared for his personal safety and drew his pistol (for which he had a CW permit) and "made Douglass back off."

Frost also presented the declaration of Stephen Soria, who personally observed some portions of the reported incident. Soria observed the initial contact and recalled that Douglass then followed about one foot behind Frost as he walked to his parked motorcycle. Soria heard the two talking as they walked but could not distinguish the words. Soria came close to the two as they stood, facing each other, by Frost's motorcycle and heard Frost tell Douglass to get way from him. Soria observed Frost pull his gun and point it at Douglass, who continued to approach Frost. Soria observed them struggling for 3-4 seconds, after which Frost backed away, put the gun in his pocket and left on his motorcycle.

The court must consider a related affirmative defense if raised by the defendant to support a showing of the absence of reasonable cause. (*People v Matthews (1972)7 CA4th 1052*) Based on the declarations of Frost and Soria alone, Frost has presented a prima facie defense that he reasonable believed he was in imminent danger, that the immediate use of force was necessary and that he used no more force than reasonably necessary.

The burden now shifts to the People to establish the existence of reasonable cause.

Respondent's Burden/Showing: Jacob Long offered the following testimony at the preliminary hearing: Long drove by the scene during the final confrontation at the motorcycle. When he observed one person "holding a gun to the other man's head," he slowed "to a dead standstill." (He later identified the two men as Frost and Douglass, respectively.) Forest was "yelling obscenities" at Douglass and was "kind of pushing" Douglass from the sidewalk to the street. Forest was holding on to the clothing of Douglass. Long did not observe Douglass make any threatening gestures and did not observe or hear Douglass say anything.

Douglass testified at the preliminary hearing that he merely touched Frost as he asked for a cigarette and that he and his acquaintance were walking in the same direction as Frost rather than following him while he and Frost were carrying on a conversation. Douglass denied making any comment regarding gangs, denied making a verbal threat and denied making any threatening gestures. Douglass stated he had turned away from Frost when Frost grabbed and turned him and pulled the pistol.

The People have shown by ample substantial evidence that reasonable cause exists to believe that Frost assaulted Douglass with a firearm in violation of PC 245(a)(2). The People also presented sufficient evidence through the preliminary hearing testimony of Long and Douglass that reasonable cause exists that Frost did not act in self defense, specifically that his belief of imminent danger, even if it existed, was

not reasonable and that he used more force than was reasonably necessary to avoid any perceived danger.

Disposition

The petition of Robert Forest for a PC § 851.8 finding of factual innocence is denied.

Dated: December 18, 2008

/s/ Richard J. Henderson
RICHARD J. HENDERSON
Judge of the Superior Court

Copies:
Timothy O. Stoen
Donald H. Heller

Court of Appeal, First Appellate District,
Division Four – No. A124144

S186284

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

ROBERT JOSEPH FOREST, Defendant and Appellant.

(Filed Oct. 20, 2010)

The petition for review is denied.

GEORGE
Chief Justice